79-483

SEP. 21 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

MRS. DOREEN M. WHITE,
Petitioner

v.

EXCALIBUR INSURANCE COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

O. L. CRUMBLEY
206 American Federal Building
Macon, Georgia 31201

Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Mrs. Doreen M. White respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above captioned case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported and we include a copy thereof in the Appendix. (App. A, p. 1a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 18, 1979. The jurisdiction of this honorable Court is invoked by virtue of 28 U.S.C.A. Sect. 1254(1).

STATUTES INVOLVED

We urge the Court to construe the following Acts of Congress:

(1) 49 U.S.C.A. Sect. 304(e) and, more especially, so much of Paragraph (2) as reads:

> "Such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, . . .".

The complete Code Section is included in Appendix (App. B, p. 12a).

(2) 49 U.S.C.A. Sect. 315 providing for common carriers to post security for the protection of the public. This Code Section is included in the Appendix. (App. C, p. 13a).

QUESTIONS PRESENTED FOR REVIEW

The principal question we ask the Court to determine is whether or not Congress, by the use of the language quoted above from 49 U.S.C.A. 304(e) intended that an employee of an independent contractor who was asleep in a sleeper cab being operated by a co-employee of the same independent contractor would, by virtue of this Act of Congress, be a statutory employee of the common carrier and therefore prohibited from filing suit against the common carrier by reason of the Workmen's Compensation Laws of the State of Georgia. The resolution of this question will, we believe, dispose of most, if not all, of the questions presented herein.

We also ask the Court to determine whether or not the provisions of 49 U.S.C.A. 315 providing for the post-

ing by the common carriers of security for the protection of the public preempts this field and would over-ride a State Law making substantially the same provisions.

Presently, there are conflicting decisions among the Circuit Court of Appeals regarding the first question which would, of course, be a matter for this honorable Court to resolve.

STATEMENT OF THE CASE

The facts in this case are not in dispute. At all times and places herein referred to, Superior Trucking Company, Inc. was engaged in both interstate and intrastate commerce as a common carrier, and was covered by a liability policy of insurance issued by Excalibur Insurance Company and filed with the Georgia Public Service Commission in accordance with the requirements of Georgia Law, Code sections 68-612, 1933 Georgia Code Ann. On May 10, 1973, Superior Trucking Company, Inc. entered into a contract with O. D. Crawford by the terms of which, Mr. Crawford was to provide a tractor together with all labor necessary for the operation of it, this unit to be used by Superior Trucking Company in their business as a common carrier. Paragraph 9 of this contract clearly made both O. D. Crawford, and all of his employees, independent contractors and read as follows:

> "Neither party hereto is the agent of the other and neither party shall have the right to bind the other by contract or otherwise. The parties intend to create by this contract the relationship of CARRIER and INDEPENDENT CONTRACTOR and not an employer-employee relationship. Neither the CONTRACTOR nor its employees are to be considered as employee or employees of the CARRIER at any time, under any circumstances."

On December 17, 1973, in pursuance to the provisions of the above contract, Mr. Crawford sent a tractor, together with two drivers, Mr. John Lindsey and Terry Wright, to Superior Trucking Company where they were dispatched with a load of insulation and aluminum going to New York. At approximately midnight, Mr. Wright climbed into the sleeper cab and went to sleep while Mr. John Lindsey began driving. At approximately 2:30 o'clock a.m. on December 18, 1973, Mr. Lindsey negligently ran this tractor trailer unit into the rear end of another tractor trailer. Both vehicles caught fire and Mr. Wright died in the fire.

Subsequently, Mrs. Doreen M. White, mother of Terry Wright, filed a suit for damages against the driver, John Lindsey, in the State Court of Bibb County, Georgia which was subsequently tried by a jury and verdict and judgment was returned in her favor in the amount of One Hundred Ten Thousand Dollars ($110,000.00).

Demand was made upon Excalibur Insurance Company for payment of this judgment and, upon their refusal to do so, suit was instituted against them in the State Court of Bibb County, Georgia. The suit was removed to the United States District Court for the Middle District of Georgia by Excalibur and the District Court subsequently ruled, in substance, that by reason of the provisions of 49 U.S.C.A. 304(e), both John Lindsey and Terry Wright were statutory employees of Superior Trucking Company, Inc. and, consequently, a recovery against Superior Trucking Company and its insuror, Excalibur Insurance Company, was barred by Georgia Code Sect. 114-103 which provided that an employee's only remedy against his employer was the recovery of Workmen's Compensation benefits and which insulated employers from suits against their employees for injuries incurred out of, and during the course of their employment.

This decision was appealed to the United States Court of Appeals for the Fifth Circuit who issued their judgment on July 18, 1979 sustaining the finding of the District Court and is the judgment from which we now seek certiorari.

Excalibur Insurance Company admits the existence of a liability policy issued to Superior Trucking Company, Inc. which was in full force and effect at the time of this accident.

BRIEF AND ARGUMENT

The point of law upon which this entire case turns is to determine the meaning of Congress when it used the following language in enacting 49 U.S.C.A. 304(e):

> "(2) Such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, . . ."

The Fifth Circuit Court of Appeals, in the case for which we now seek certiorari, has interpreted this to mean that Congress has abolished the concept of independent contractors, and has decreed that the operator of any equipment being used in interstate commerce is an employee of the carrier by operation of this Act.

The Fourth Circuit Court of Appeals, in the case of *Proctor* v. *Colonial Refrigerated Transportation, Inc.*, 494 F. 2d 89 had before it a case on all fours with the White case and was identical on its facts, and determined that it was the intent of Congress that the parties would occupy whatever status they had established by their employment contract, and if that contract made the party an independent contractor and he was not the actual operator of the vehicle at the time of the accident,

he was entitled to maintain a suit against the common carrier. On page 92 of the Proctor decision, we find the following:

> "The equipment, of course, was not owned by Proctor, and in his position as an employee of Bales, there was no contractual relationship between Proctor and Colonial. In the context of Colonial's responsibility under the Commission's regulations, Proctor was as much a stranger to Colonial as a shipper or a member of the traveling public, and to deny him recovery upon the independent contractor theory would undercut the primary purpose of the regulatory design."

This is factually precisely the same situation we have in the White case. Mr. Terry Wright, did not own the equipment being operated, and there was no contractual relationship between he and Superior Trucking Company, as he had contracted his employment with O. D. Crawford. Neither was there any common law relationship between Mr. Wright and Superior Trucking Company. There being neither a contractual nor a common law relationship between the parties, Mr. Wright was as much a stranger to Superior Trucking Company as a member of the traveling public. By a simple substitution of names, the Proctor decision would fit the present case on all fours, and would read as follows:

> The equipment, of course, was not owned by Wright, and in his position as an employee of O. D. Crawford there was no contractual relationship between Wright and Superior Trucking Company. In the context of Superior Trucking Company's responsibility under the Commission's regulations, Wright was as much a stranger to Superior Trucking Co. as a shipper or a member of the traveling public, and to deny him recovery upon the independent contractor theory would undercut the primary purpose of the regulatory design.

A copy of the Proctor decision is included in the appendix (App. D, p. 15a).

In its decision of July 18, 1979, the Fifth Circuit acknowledged the conflict of this decision with the Proctor case, it noted that the Proctor court never considered the possibility that State Workmen's Compensation law might act as a bar to suit against the carrier. We submit that this was not a valid distinction to be made, for the Proctor Court, having determined that Proctor was as much a stranger to the common carrier as a shipper or a member of the traveling public, would hardly have found him entitled to recover Workmen's Compensation benefits.

49 U.S.C.A. 304(e) has also been ruled on by the Tenth Circuit in the case of *Cape Air Freight, Inc.* v. *United States*, 586 F.2d 170. This case was not identical on its facts, but turned on a determination of the same legal principles. In this case, the plaintiff had been ordered by the Interstate Commerce Commission to discontinue all operations conducted through the use of agents and hence forth, its operations must utilize company employees, company terminals and company vehicles. The Tenth Circuit ruled that the Interstate Commerce Commission had exceeded its authority in issuing this order, since the right to augment its equipment and personnel by a lease agreement, or other arrangement, was specifically authorized by 49 U.S.C.A. Sect. 304(e). This case is in direct conflict with the decision of the Fifth Circuit in the case at bar, in that the Fifth Circuit would have held that the ruling of the Interstate Commerce Commission was correct, since as a matter of law, the drivers of the vehicles were employees. *We are, therefore, in the position that there are conflicting and irreconcilable differences between decisions in the Tenth and Fourth Circuit Court of Appeals and the decision of the Fifth Circuit Court of Appeals, for which we now seek certiorari.*

We respectfully urge upon the Court that the Fourth Circuit and Tenth Circuit decisions announce the true rule. i.e. that, as between the parties, they bear whatever relationship they, themselves, have chosen to make along with all of the rights, duties, responsibilities and liabilities as attach to that relationship, and are not employee-employer as a matter of law, as was ruled by the Fifth Circuit.

We believe that the Fifth Circuit was led into error by giving too literal and restricted interpretation to the wording in Section 304 that the motor carriers would have full direction and control of such vehicles and would be fully responsible for the operation thereof. This honorable Court, in the case of *Transamerican Freight* v. *Brada Miller*, 423 U.S. 28, 46 L Ed 2d 169, 96 S Ct 229 had occasion to consider this precise point and, under headnote 2, at page 176 in the Lawyers Edition, the Court had this to say:

> "[2] A lease of equipment, which is permissible under defined circumstances, must be distinguished, however, from a sharing or lending of operating authority, which is not permitted. . . . The regulations, however, do not require the lessee itself to operate the equipment; the lessor may perform that task by furnishing the driver with the equipment. But the lessee must assume the responsibility for the shipment and have full authority to control it."

On page 177 of the Lawyers Edition, this honorable Court expressed the intention of Congress in placing the duty of control on the common carrier in the following words:

> "It is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements AND OF FIXING FINANCIAL RESPONSIBILITY FOR

> DAMAGE AND INJURIES TO SHIPPERS AND MEMBERS OF THE PUBLIC, WERE THE SIGNIFICANT AIMS AND GUIDEPOSTS IN THE DEVELOPMENT OF THE COMPREHENSIVE RULES." (emphasis added).

Again, on page 178 of the Lawyers Edition, we find the following:

> "[3] It is to be acknowledged, to be sure, that the lessor's furnishing of a driver allows an aspect of control, in a sense, to remain in the lessor. BUT THIS IS MINISTERIAL CONTROL, not control of the kind with which the Commission was concerned in Ex Parte No. MC-43. Its concern, as we have noted, was with operating authority, with routes and destinations and classes of freight, with the integrity of certifications, and with that ultimate control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission.
>
> The Commission observed:
>
> 'It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation.' 52 MCC, at 681."

Accordingly, this honorable Court has already interpreted these words as simply meaning that, irrespective of who owned the equipment being operated, or whose employees may be operating it, the sole purpose of this Act of Congress was to insure that the holder of the certificate to operate as a common carrier would bear full responsibility, including financial responsibility, for those injured by reason of the exercise of its franchise.

That this is the correct interpretation of the Act of Congress is clearly shown by the Legislative history of this Act. Considerable difficulty had arisen in the trucking industry, primarily because of the custom in the industry of leasing vehicles. One of the problems which had developed was the financial irresponsibility of many of the lessors. The Interstate Commerce Commission had attempted to correct this situation, but their rules and regulations were being attacked as unconstitutional, or exceeding their authority, which had led to tremendous litigation. An exhaustive discussion of these problems is contained in *American Trucking Associations, Inc.* v. *United States*, 344 US 298, 97 L Ed 337, 73 S Ct 307, decided by this honorable Court in 1953. Congress enacted 49 U.S.C. Sect. 304 in 1956 and, apparently, simply enacted the rules and regulations of the I.C.C. to give them the full force of law. The Act, itself, is headed "REGULATIONS GOVERNING USE OF VEHICLES OWNED BY OTHERS" and the first paragraph provides that common carriers may augment their equipment by leases, contracts, or other arrangements of motor vehicles not owned by them. Had it been the intention of Congress to interdict entirely the operation of leased vehicles, it could, very easily, have stated that henceforth, common carriers engaged in interstate commerce shall use only their vehicles and their own employees to operate them. Since it did not do so, but rather specifically provided for the use of leased vehicles, we urge that the interpretation of this Act as found in *Transamerican Freight Lines, Inc. supra* is correct and that the Fifth Circuit is in error in holding that this Code Section makes the operators of leased vehicles employees of the common carrier as a matter of law. But if the common carrier is authorized to augment its equipment by leases, contracts, or other arrangements, it necessarily follows that, where they do so, their leases, contracts and other arrangements must be given force

and effect and that the Courts recognize the relationship which the parties have created. In the present case, there can be no question but what both Mr. Lindsey and Mr. Terry Wright were employees of Mr. O. D. Crawford and that Mr. Crawford, and all of his employees, were independent contractors engaged by Superior Trucking Company, Inc. As an independent contractor, Mr. Wright and Mr. Lindsey had a perfect right to file a suit for damages against Superior Trucking Company since, by Georgia law, the principal of an independent contractor does not owe Workmen's Compensation benefits to his independent contractor and is not, therefore, entitled to the immunity from suit granted an employee's employer.

> "If the claimant was an independent contractor at the time of his accident, the accident is not compensable." (*Travelers Insurance Co.* v. *Faulkner*, 63 Ga. App. 438, 439) (11 S.E. 2d 367).
>
> ". . . The relation of contractee and independent contractor exists, and where one is injured while in the employ of the independent contractor, the contractee is not liable under the Workmen's Compensation Act as an employer of the employee of the independent contractor." (*Cooper* v. *Dixie Construction Co.*, 45 Ga. App. 420, headnote 3) (165 SE 152).

See also: *United States Fidelity & Guarantee Co.* v. *Corbett*, 31 Ga. App. 7, (119 SE 921); *Irving* v. *Home Accident Insurance Co.*, 36 Ga. App. 551, headnote 1, (137 SE 105); *Gay* v. *Greene*, 91 Ga. App. 78, 80 (84 SE 2d 847); and *Blair* v. *Smith*, 201 Ga. Rep. 747 (41 SE 2d 133).

That this rule is well established in Georgia law has been recognized, and approved, by the Federal Courts in the cases of *Mosley* v. *George A. Fuller Co.*, 250 F. 2d 686 (CA5, 1957) and *Scott* v. *Crescent Tool Co., Division of Crescent Niagra Corp.*, 296 F.Supp. 158 (ND GA, 1969).

The original suit was filed to the State Court of Bibb County, Georgia and named only the driver, Lindsey, as a defendant. Nevertheless, the common carrier and its insurance carrier would be liable for payment of any judgment rendered against its driver. Georgia Code Sect. 68-612 provides that any common carrier desiring a permit to engage in intrastate commerce must first file with the Georgia Public Service Commission a policy of insurance for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents. It provides further that:

> "If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract."

In interpreting this Code Section, the Georgia Courts, in the case of *Tarrant* v. *Davis*, 62 Ga. App. 880, at 884 (10 SE 2d 636) held as follows:

> "The plaintiff could have sued the driver alone, or the motor carrier alone, or she could have sued them jointly. She could have sued the insurance carrier alone, or as authorized by the Act, she could have joined the motor carrier and the insurance carrier in the same action, irrespectively of whether it sounded in tort or in contract. The negligence relied on in each of the actions would have been the negligence of the driver of the motor vehicle. The driver himself was liable because of his own negligence. The motor carrier was liable because of the doctrine of respondeat superior. The insurance carrier was liable because it assumed by contract a liability for the negligence either of the motor carrier or of the agent or driver. Unless a cause of action is made out against the driver, under the allegations as here shown, there can be no recovery against anyone."

Such a suit would have been authorized whether or not the common carrier was certified for both intrastate

or interstate commerce, and even though, at the time of the injury sued upon, the motor carrier was operating solely in interstate commerce. (*Harper Motor Lines, Inc.* v. *Roling*, 218 Ga. Rep. 812 (130 SE 2d 817).

To the same effect, see *Great American Indemnity Co.* v. *Vickers*, 183 Ga. Rep. 233 (188 SE 24); *Spicer* v. *American Home Assurance Co.*, 402 F 2d 988 (CA 5, 1968) (same as 292 F. Supp. 27); *Tucker* v. *Casualty Reciprocal Exchange*, 40 F. Supp. 383 (ND Ga., 1941); *Cosmopolitan Mutual Insurance Co.* v. *White*, 336 F. Supp. 92 (D Delaware, 1972); *Proctor* v. *Colonial Refrigerated Transport, Inc.*, 494 F 2d 89 (CA 4, 1974); *Acme Freight Lines, Inc.* v. *Blackmon*, 131 F 2d 62 (CA 5, 1942); and *Gallahar* v. *George A. Rheman Co.*, 50 F. Supp. 655 (SD Ga. 1943).

Accordingly, it is clear that the choice as to who would be named defendant is entirely the choice of the plaintiff. However, as noted above, both the common carrier and its insurance company would derive their liability from any judgment rendered against the driver. The common carrier, as in this case, would be liable by reason of the direct imposition upon them of the operator's negligence by virtue of 49 U.S.C.A. 304(e) and the insurance carrier would derive their liability from the fact that they had filed with the Georgia Public Service Commission a policy of insurance agreeing to indemnify the public for injuries received as a result of the negligent operation of the motor vehicle.

In the case of *Great American Indemnity Co.* v. *Vickers*, 183 Ga. 233 (188 SE 24) the Georgia Courts held:

> "An insurance policy issued to a motor common carrier, with the approval of the Public Service Commission . . . which provides that the policy is one 'for the protection of the public against injuries proximately caused by the negligence of such motor

carrier, its servants or agents,' and which in terms provides that such policy 'shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby,' is a contract evidencing a direct obligation to pay the damage sustained by any member of the public by reason of injury or loss proximately caused by the negligence of the motor common carrier in the operation of its motor trucks along a public highway of this State; and a suit upon the policy by a member of the public, alleging such actionable injury or loss, may be maintained without first having obtained a judgment establishing liability for such negligence against the motor carrier, and without making the motor carrier a party to the suit; any provisions in the policy, or in any rider attached thereto, to the contrary notwithstanding."

This principle of law has been consistently followed up to, and including, the present time by the Georgia Courts, and has been well recognized by the Federal Courts.

> "Persons injured on highways of Georgia by negligence of motor carrier which had qualified as common carrier for hire both in interstate and intrastate commerce were entitled to rely on Georgia Statute requiring carrier to file liability policy for protection of public and permitting joinder of insurance carrier in action against motor carrier whether particular vehicle was at time of accident engaged in interstate or intrastate commerce." (*Acme Freight Lines, Inc.* v. *Blackmon*, 131 F 2d 62) (CA 5—1942). "Primary purpose of requiring bond, policy of insurance, or other security as condition to operation of public service motor vehicles for hire is for protection of public, by assuring those who are injured, in person or property, through negligent operation of such vehicle, compensation for injuries or damages sustained." (Ga. Code Sect. 68-612)

> "Under bond or policy required as a condition to operation of public service motor vehicles for hire, public has statutory right which can not be impaired by stipulations between immediate parties to security contract and as between insurer and insured, insurer's liability is contractual, and, depending on terms of bond or policy, is either against loss or against liability." (*Spicer* v. *American Home Assurance Co.*, 402 F 2d 988) (CA 5—1968).

See also *Tucker* v. *Casualty Reciprocal Exchange*, 40 F. Supp. 383 (ND Ga., 1941); *Gallahar* v. *George A. Rheman Co.*, 50 F. Supp. 655 (SD Ga. 1943). If Mr. Wright was an independent contractor, he also had an "actionable injury" to permit him to sue. This phrase was interpreted by the Fifth Circuit Court of Appeals in the case of *Spicer* v. *American Home Assurance Co.*, 402 F 2d 988 (CA 5, 1968) (same as 292 F. Supp. 27, ND Ga., 1967) in which the Court held:

> "Phrase 'actionable injury' as used in Georgia Statute regarding posting of bond or policy as condition precedent to issuance of certificate for public service motor vehicle carrier means an injury to a person who could sue carrier and obtain judgment for injuries sustained, and broadly includes all third parties injured by negligence of motor carrier or its servants, but excludes employees of carrier who could not sue employer. Code Georgia Section 68-612."

This would, of course, have prohibited Mr. Wright from filing a suit against his employer, Mr. O. D. Crawford, but presents no impediment to him filing such a suit against the common carrier, to whom he had no legal relationship.

We further take exception with the Court's finding in Section V of its decision in which the Court attempted to apply the provisions of 49 U.S.C. Sect. 315 relating to an ICC requirement for the posting of a security bond

by one engaged in interstate commerce. It cites as authority for this holding, the case of *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F 2d 131, 139 (8 Cir. 1974). Our first objection to this holding is that we were in a Georgia State Court trying a tort action which arose in the State of Georgia and to which Georgia law applied. The attempt to interject Federal law regarding matters covered by State law was not only contrary to the holding of the United States Supreme Court that the laws of the State govern the duties and liabilities of the parties and are to be applied to the case (*Erie Railroad Co.* v. *Tompkins*, 304 US 64; 58 S Ct 817; and 82 L Ed. 1188;) but were contrary to its own decisions in *Acme Freight Lines, Inc.* v. *Blackmon*, 131 F 2d 62 (CA 5, 1942) and *Spicer* v. *American Home Assurance Co.*, 402 F 2d 988 (CA 5, 1968), which specifically held that Georgia residents are entitled to rely on Georgia law. The law we relied upon was not 49 USC Sect. 315, but rather Georgia law as expressed in Code Sect. 68-612, 1933 Ga. Code Ann. as interpreted in the many decisions cited herein.

Our second objection is that the Court misinterpreted the Wellman case. Insurance coverage was denied in that case for the reason that the truck, at the time of the accident, was engaged in hauling a load of merchandise for an entirely different company than the one named in the policy and the Court held that the insurance policy issued to one company did not cover the second company. There is no such problem in this case, as it is conceded that, at the time of this accident, the truck involved was leased to Superior Trucking Company and was engaged in a trip dispatched by Superior.

CONCLUSION

In conclusion, we say again that the interpretation to be placed on 49 U.S.C. Sect. 304(e) will determine all of the issues in this case, for we believe that the evidence is clear that there is no merit to the Court's finding that a judgment had to be obtained against the common carrier. If the Fifth Circuit is correct that this Code Section makes all drivers of leased vehicles employees, then the plaintiff has no case, for we concede that, in the State of Georgia, an employee is barred from suing his employer, or the employer's insurance company, in tort. If the Fourth Circuit and the Tenth Circuit are correct and the parties bear whatever relationship they, themselves, have created with all of the rights, duties and liabilities that attach to that relationship, then the plaintiff has a perfectly valid claim against the common carrier and its insurance company.

We would most earnestly urge that the Court grant certiorari in this case, for we are dealing with one of the most fundamental and vital areas of commerce. It is fundamental that every employer know who his employees are, and every employee to know his employer. As an employer, I owe nothing to an independent contractor except payment of his fee. However, I owe a great many duties to an employee including salary negotiations; union activities; the withholding and payment of Social Security and withholding tax; the filing of quarterly returns; providing an insurance and retirement program, particularly Workmen's Compensation insurance and many other duties. Similarly, an employee needs to know his employer in order that he might know what duties he owes, to whom, and to whom he might turn for succor in the event of misfortune.

We therefore earnestly urge this honorable Court to grant certiorari; to hold that the plaintiff's son, Terry

Wright, was an employee of O. D. Crawford, by virtue of his contract of employment with Mr. Crawford; that Mr. Crawford, and all of his employees were independent contractors by virtue of the contract between Mr. Crawford and Superior Trucking Company; that, being an independent contractor, and not engaged in the operation of this vehicle at the time of the accident, the plaintiff has a right of action for the death of her son, Terry Wright; that John Lindsey is liable for the judgment rendered against him in the State Court of Bibb County, Georgia by reason of the jury verdict and judgment obtained therein; that Superior Trucking Company, Inc. is also liable on the judgment rendered against Lindsey by virtue of 49 U.S.C. Sect. 304(e); that the defendant, Excalibur Insurance Company is also liable on the judgment rendered against Lindsey by virtue of the policy of insurance it filed with the Georgia Public Service Commission in compliance with the requirements of Georgia Code Section 68-612; and that the judgment of the United States Court of Appeals for the Fifth Circuit dated July 18, 1979 in the case of *White* v. *Excalibur Insurance Company* be reversed and remanded with direction that judgment be entered up in favor of the plaintiff, Mrs. White.

Respectfully submitted this 14th day of September, 1979.

O. L. CRUMBLEY
206 American Federal Building
Macon, Georgia 31201

Attorney for Petitioner

APPENDICES

APPENDIX A

Fifth Circuit Decision in White v. Excalibur Insurance Co.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 77-2250

DOREEN M. WHITE,
Plaintiff-Appellant
v.

EXCALIBUR INSURANCE COMPANY,
Defendant-Appellee

July 18, 1979

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

When James Madison praised the benefits of federalism, he could not anticipate the problems that would be raised by the synergistic interaction on a complex industrial society of federal and state statutory plans having diverse aims. A federal statute, the Interstate Motor Common Carrier Act, 49 U.S.C. § 301, *et seq.*, makes motor carriers responsible for the torts of employees of the independent contractors from whom the carrier leases vehicles. Georgia has enacted a workmen's compensation law, and its statutes also govern the insurance obligations of motor carriers. We here consider whether a driver, who during his rest period was killed by the tort

of a fellow worker then actually operating the vehicle aboard which both were employed, may recover in tort from the carrier or whether his remedy is limited to compensation. Concluding that motor carriers who are by federal law burdened with statutory employer liability for the acts of vehicle lessors are also entitled to the protection afforded employers by state law, we affirm the denial of relief.

I.

Superior Trucking Company, a licensed interstate motor carrier, entered into a lease agreement with O. D. Crawford in May, 1973 under which Crawford agreed to provide Superior with trucks and drivers to be used in Superior's business. Among the provisions of this agreement was one purporting to establish the relationship of employer-independent contractor between Superior and Crawford.[1]

Terry Wright, who was appellant's son, and John Carroll Lindsey were working for Crawford as drivers, hauling merchandise for Superior pursuant to the lease. On December 17, 1973, while Lindsey was driving and Wright was asleep in the cab, their truck was involved in a collision, and Wright died in the ensuing fire.

Mrs. White brought a tort action in state court against Lindsey to recover for her son's wrongful death. After a jury trial, she was awarded $110,000. She then filed suit in an effort to collect the judgment from Excalibur Insurance Company, Superior's insurer.

[1] Section 9 of the contract provided as follows:

> Neither party hereto is the agent of the other and neither party shall have the right to bind the other by contract or otherwise. The parties intend to create by this contract the relationship of Carrier and Independent Contractor and not an employer-employee relationship. Neither the Contractor nor its employees are to be considered as employee or employees of the carrier at any time, under any circumstances.

There being no contested issues of fact, the district court determined that Mrs. White had no right to recover from Excalibur because Terry Wright was, by virtue of federal law, a statutory employee of Superior. As such, Wright was not a beneficiary of the Excalibur insurance policy issued in compliance with Ga. Code Ann. § 68-612 to protect "the public," and his mother's sole remedy against Superior was workmen's compensation. *See* Ga. Code Ann. § 114-103. The court declined to find an independent right of recovery in tort against Superior under federal law because it concluded that fellow employees were outside the scope of the protection Congress sought to confer on the public by 49 U.S.C. §§ 304 and 315. Moreover, Mrs. White could recover from the insurer under federal law only if she had obtained a judgment against the carrier, Superior. We agree with the legal conclusions of the trial judge in each of these respects.

II.

Motor carriers had attempted to immunize themselves from the negligence of the drivers who operated their vehicles by making them all nominally "independent contractors." *See generally Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Systems, Inc.*, 1975, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169; *American Trucking Associations, Inc.* v. *United States*, 1953, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337; *Alford* v. *Major*, 7 Cir. 1972, 470 F.2d 132. In order to be certain that the public would be protected from the torts of these frequently insolvent operators, Congress in 1956 adopted amendments to the Interstate Motor Common Carrier Act requiring a motor carrier to assume "full direction and control" of leased vehicles. 49 U.S.C. § 304(e);[2] 49 C.F.R.

[2] That section reads as follows:

> (e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the

§ 1057.4(a)(4). *See* H.R. Rep. No. 2425, 84th Cong., 2d Sess. (1956), *reprinted in* [1956] U.S. Code Cong. & Admin. News, pp. 4304, 4307. Because the carrier now has both a legal right and duty to control vehicles operated for its benefit, the employees of the vehicle-lessor are deemed statutory employees of the lessee-carrier to the extent necessary to insure the carrier's responsibility for the public safety just as if the lessee-carrier were the owner of the vehicles. *Simmons* v. *King*, 5 Cir. 1973, 478 F.2d 857, 867.

While Mrs. White appears to concede that Lindsey as driver of the leased vehicle was a statutory employee of Superior, she argues that Wright was not actively engaged in Superior's business at the time of the accident and therefore was a stranger to the carrier. The distinction sought to be drawn between a driver on duty and operating the vehicle and a driver on duty and sit-

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use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full dierction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

ting on the right hand seat or asleep in the rest compartment is specious. Wright was not in a position comparable to being "at home asleep in his own bed." He was part of the two-man team actually engaged in operating the vehicle on Superior's business. The team is indispensable to continual vehicle operation for federal law generally permits each driver to work only ten hours at a time and then to obtain at least eight hours of rest. 49 C.F.R. § 395.3(a) (1977). The activities of each of the pair during a single driving stint, including his rest period, are clearly within the course of his employment. We see no reason to distinguish Wright from Lindsey for purposes of his relationship to Superior merely because it was Lindsey's turn at the wheel. Had Wright not been asleep while resting and had he committed some tort, such as negligently tossing an object from the truck window injuring a pedestrian, Superior would have been liable for his acts. We therefore conclude that both drivers were statutory employees of Superior within the meaning of 49 U.S.C. § 304(e).

III.

The statutory employee status created by federal law may affect employer-employee relationships under otherwise controlling state statutes where direction and control of the worker by the federally regulated employer are central to the regulatory program. *See, e.g., Hartford Accident & Indemnity Co.* v. *Major*, 1967, 81 Ill. App.2d 251, 226 N.E.2d 74. We have previously concluded that the Georgia Workmen's Compensation Law may be applied to such a mutation. In *Ward* v. *Kraftco Corp.*, 5 Cir. 1977, 559 F.2d 1215 (unpublished opinion, No. 77-1743, September 6, 1977) the plaintiff was a member of a two-worker driving team but was not driving at the time of the accident and was therefore in a position analogous to that of Terry Wright; we held that he was a statutory employee of the lessee-carrier

under Georgia law, and that his sole remedy against the carrier and its insurer was under the Georgia Workmen's Compensation Law. *See* Ga. Code Ann. § 114-103. Similarly here, because Terry Wright was a statutory employee of Superior by virtue of 49 U.S.C. § 304(e), his mother is barred by Georgia law from seeking a remedy apart from workmen's compensation. Superior has workmen's compensation insurance, and has admitted its compensation liability to Mrs. White and, of course, to all statutory employees injured in its service.

This result is completely consistent with the policy underlying the federal law. Congress wished to impose on lessee-carriers responsibility for the operation of leased vehicles "as if they were the owners of such vehicles," 49 U.S.C. § 304(e)(2); H.R. Rep. No. 2425, 84th Cong., 2d Sess. (1956), *reprinted in* [1956] U.S. Code Cong. & Admin. News, pp. 4304, 4309. To make them assume the burden of liability for the harm caused by their leased vehicles without according them the protection given employers under state substantive law would broaden their exposure to suit beyond that to which employers in fact are subject. We find no warrant for such strict liability in the federal law. *See, e.g., Wilcox* v. *Transamerican Freight Lines, Inc.*, 6 Cir. 1967, 371 F.2d 403, 404, *cert. denied*, 387 U.S. 931, 87 S.Ct. 2053, 18 L.Ed.2d 992.

Nor is this result solely one that benefits the carrier at the expense of lessor-employed drivers. Had Wright been injured in any fashion during the course and scope of his employment, he would have had compensation protection from Superior. His direct employer's insolvency would not have jeopardized his rights. The total economic benefit conferred on all lessee-hired drivers by receiving workmen's compensation coverage may well exceed the detriment caused by denying them a tort remedy against the carrier for the negligence of fellow workers.

We are not unware of the Georgia jurisprudence holding that an employer is not ordinarily obligated to provide workmen's compensation coverage to employees of his independent contractor. *See, e.g., Mosley* v. *George A. Fuller Co.*, 5 Cir. 1957, 250 F.2d 686; *Blair* v. *Smith*, 1947, 201 Ga. 747, 41 S.E.2d 133; *Travelers Insurance Co.* v. *Faulkner*, 1940, 63 Ga. App. 438, 11 S.E.2d 367; *United States Fidelity & Guaranty Co.* v. *Corbett*, 1923, 31 Ga. App. 7, 119 S.E. 921. However, the effort of the carrier and the vehicle lessor to create by contract an independent contractor relationship cannot operate to frustrate the federal design to impose responsibility on the carrier for acts of those who might otherwise be independent contractors. Because Congress has created the statutory employee status, and, as we have concluded, the carrier-lessee is deemed an "employer" for purposes of the Georgia Workmen's Compensation Law, the Georgia cases dealing with independent contractors are not applicable.

IV.

In concluding that Wright was a statutory employee of Superior and was covered by Superior's workmen's compensation program, we have necessarily decided that he suffered no "actionable injury" to enable him to recover under Ga. Code Ann. § 68-612.[3] This Georgia in-

[3] Ga.Code Ann. § 68-612 provides in relevant part:

> No certificate shall be issued or continued in operation unless the holder thereof shall give and maintain bond, with adequate security, . . . for the protection of the public against injuries proximately caused by the negligence of such motor carriers, its servants or agents. . . . [S]uch bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The commission may, in its discretion, allow the holder of such certificate to file, in lieu of such bond, a policy of indemnity insurance in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds,

surance statute was enacted "for the protection of the public" by requiring motor carriers operating within the state to post a bond or file an insurance policy with the Public Service Commission ensuring their financial responsibility for injuries caused by their operations. To claim the benefit of the statute's provisions an injured party must: (1) be a member of the public, i.e., within the class the legislature intended to protect by the act; (2) suffer "actionable injury"; and (3) show that this injury was proximately caused by the negligence of the motor carrier or its employee. *See Tarrant* v. *Davis*, 1940, 62 Ga. App. 880, 10 S.E.2d 636. The term "actionable injury" means an injury to a person who could sue and obtain a judgment against the common carrier, and necessarily excludes employees of the carrier who could not sue the employer. *American Home Assurance Co.* v. *Spicer*, 5 Cir. 1968, 402 F.2d 988, *affirming* N.D. Ga. 1967, 292 F.Supp. 27, 31, *cert. denied*, 1969, 394 U.S. 946, 89 S.Ct. 1275, 22 L.Ed.2d 479; *Combs* v. *Carolina Casualty Insurance Co.*, 1954, 90 Ga. App. 90, 92, 82 S.E.2d 32. Because this suit would be barred under the Georgia Workmen's Compensation Law, Mrs. White fails on the second prerequisite.

Even were we able to conclude that *Ward* v. *Kraftco*, *supra*, is not persuasive precedent here, we would still agree with the court below that § 68-612 is unavailable here because Wright was not a member of the "public" for whom the statute was enacted. The Georgia Court of Appeals has construed the term as excluding the employees of the motor carrier when injured by the negligence of a fellow servant. *Combs* v. *Carolina Casualty Insurance Co.*, *supra*, 90 Ga. App. at 91, 82 S.E.2d at 34. The language of that case compels us to conclude

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and must likewise be approved by the commission. . . . If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract.

that § 68-612 was designed to protect strangers to the motor carrier, not those who, although receiving paychecks from a lessor, are involved in the operations of the carrier as if they were employees. The lack of any contractual relationship between Wright and Superior was irrelevant; his activities within the scope of his employment were determined by the contractual relationship between Superior and Crawford. It was implicit in his acceptance of employment with Crawford that he agreed to drive trucks in behalf of anyone with whom Crawford contracted. His contact with Superior was therefore not one of chance against which he needed assurance of the company's solvency. Wright was driving for Superior as a part of his employment; his remedy was one of employee against employer.[4]

V.

Mrs. White lastly contends that, even if she cannot recover under Georgia law, Superior is liable for her son's death as a matter of substantive federal law implicit in 49 U.S.C. § 304(e). In effect, Mrs. White argues that the federal statute makes common carriers absolutely liable for all harm caused by the operation of their leased vehicles.

The trial court correctly concluded that, insofar as Mrs. White seeks recovery solely under § 304(e), she is barred from recovering from Excalibur due to her failure to secure a judgment against the insured motor carrier. While such a judgment is unnecessary to recover under Ga. Code Ann. § 68-612, *see, e.g.*, *Tarrant* v. *Davis*, *supra*, 62 Ga. App. at 884, 10 S.E.2d at 637, by the terms of

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[4] Because Wright was not one of the "public" for whom § 68-612 was enacted, he also fell outside the coverage of the insurance policy issued by Excalibur in compliance with the requirements of that statute. *See, e.g., Great American Indemnity Co.* v. *Vickers*, 1936, 183 Ga. 233, 188 S.E. 24.

49 U.S.C. § 315[5] in order for Excalibur to be liable under the policy filed by Superior with the ICC, Superior must first be adjudicated liable as a party. *See Wellman* v. *Liberty Mutual Insurance Co.*, 8 Cir. 1974, 496 F.2d 131, 139. Because we have held that Wright suffered no "actionable injury," nor was he a member of the "public" within the meaning of § 68-612, Mrs. White could recover only under § 304(e). Her decision to sue only John Carroll Lindsey in state court precludes any relief in this action.

Even had Wright's mother obtained a judgment against Superior in her prior suit, however, we would still be constrained to hold that Wright was no more an intended beneficiary of § 304(e) than he was a member of the public for purposes of Ga. Code Ann. § 68-612, and thus that federal law does not create a tort remedy for his survivors.

In reaching this result we must respectfully differ with our brethren in the Fourth Circuit who decided in *Proctor* v. *Colonial Refrigerated Transportation, Inc.*, 4 Cir. 1974, 494 F.2d 89, that the employee of a lessor, injured by a fellow servant who was then driving the leased truck, is a member of the public with respect to

[5] The relevant portion of 49 U.S.C. § 315 provides:

> No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others.

the carrier under § 304. Despite the lack of contractual agreement between the carrier and the lessor's employees, they cannot be considered strangers to the lessee, comparable, as the court in *Proctor* asserts, to members "of the traveling public," when engaged in operating a leased vehicle in the lessee's business. *See id.* at 92. They stand apart not merely from other travelers but from all of the rest of the public who are not directly engaged in furthering the economic interest of the carrier and who are as a result made its responsibility under § 304. For the same reasons that we have concluded that Wright was not a member of the "public" for purposes of Ga. Code Ann. § 68-612, we must also hold that he was not a member of the public for purposes of the applicability of federal substantive law created by § 304 and must seek his remedy elsewhere.[6]

For all of these reasons, the judgment appealed from is AFFIRMED.

[6] The court in *Proctor* never considered the possibility that state workmen's compensation law might act as a bar to suit against the carrier by the lessor's employees, possibly because the court never explicitly considered whether Proctor was a "statutory employee" of the lessee-carrier under § 304(e).

APPENDIX B

49 U.S.C.A. Section 304(e)

Regulations governing use of vehicles owned by others

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicle and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

APPENDIX C

49 U.S.C.A. Section 315

§ 315. Security for protection of public

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belong [1] to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements,

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[1] So in original. Probably should read "belonging".

to the extent of the sum so paid. The Commission may prescribe, with respect to motor carriers operating within the United States in the course of engaging in transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country, such reasonable regulations concerning security for the protection of the public as the Commission is authorized, by this section, to prescribe for other motor carriers. Feb. 4, 1887, c. 104, Pt. II, § 215, as added Aug. 9, 1935, c. 498, 49 Stat. 557, and amended July 22, 1954, c. 563, § 2, 68 Stat. 526.

APPENDIX D

Decision in

Proctor v. Colonial Refrigerated Transportation, Inc.

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

No. 72-1211

JAMES M. PROCTOR,
Appellant,
v.
COLONIAL REFRIGERATED TRANSPORTATION, INC.,
Appellee.

Argued Nov. 6, 1973

Decided March 27, 1974

Henry Hammer, Columbia, S. C. (James W. Cothran, William P. Baskin, Bishopville, Lawrence M. Gressett, Jr., St. Matthews, S. C., on brief), for appellant.

Ronald E. Boston, Columbia, S. C. (H. F. Padget, Jr., and Turner, Padget, Graham & Laney, Columbia, S. C., on brief), for appellee.

Before CRAVEN, RUSSELL and FIELD, Circuit Judges.

FIELD, Circuit Judge:

James M. Proctor sustained serious injuries in an accident while riding as a passenger in a tractor-trailer being driven by one, E. O. Bales, under a lease arrangement with the defendant, Colonial Refrigerated Transportation, Inc. (Colonial). Proctor instituted this diversity action to recover damages from Colonial. Pur-

suant to a jury verdict, judgment was entered in the district court in favor of the defendant and the plaintiff has appealed.

Colonial is a certified interstate motor carrier, and about a year before the accident in question had entered into a written agreement with Bales under which he agreed to furnish a tractor and driver to transport commodities in trailers owned by Colonial. Colonial had also entered into an identical agreement with the plaintiff Proctor. Several days prior to the accident Proctor's tractor became disabled and was placed in a Maryland garage for repairs. Thereafter, Proctor was hired by Bales as an assistant driver in transporting a trailer of Colonial to Florida. While driving through South Carolina the tractor was involved in a collision with another truck killing Bales and seriously injuring Proctor.

Proctor's complaint alleged negligence on the part of Bales as an agent of Colonial, and also charged that Colonial permitted the tractor-trailer rig to be operated when it knew or should have known that the trailer had a defective coupler assembly.

The primary issue upon this appeal is whether a motor carrier operating under a certificate from the Interstate Commerce Commission is liable to an employee of a lessor for injuries resulting from the negligence of the lessor in the operation of his equipment in the business of the lessee-carrier. Incident to this issue the plaintiff challenges that part of the district court's charge which told the jury that if they determined the relationship between Bales and Colonial was that of independent contractor-employer at the time of the accident, they should return a verdict for the defendant.[1]

[1] The court's charge on this point was as follows:

I charge you that if you determine that the relationship between Mr. Bales, the driver of the defendant vehicle, and the defendant, was that of independent contractor-employer at the time of the accident in question, you must return a verdict for the defendant, because under the law this defendant is not responsible for negligent, or reckless, or willful or wanton acts committed by persons it has engaged or employed to perform independent services.

However, should you determine that the relationship between Bales and the defendant was that of master-servant, or principle or agent, or employer-employee, plaintiff would be entitled to recover, if plaintiff has proved by a preponderance of the evidence that the deceased, Bales, operated the defendant's vehicle in a negligent, or reckless manner which proximately contributed to and caused the wreck in issue.

In support of his position, plaintiff relies heavily on the South Carolina case of Reed v. Southern Ry.-Carolina Division, 75 S.C. 162, 55 S.E. 218 (1906). In that case the plaintiff's intestate had been injured by the negligence of the Southern Railway Company which had leased the railway lines and equipment from the defendant Southern Ry.-Carolina Division. The operating lessee Southern Railway Company, by whom plaintiff's intestate was employed, was originally made a party defendant to the action. When the case was removed to the federal court the plaintiff dismissed the action against Southern Railway Company, had the case remanded to the state court, and proceeded solely against the lessor Southern Ry.-Carolina Division. In recognizing that the plaintiff had a cause of action against the lessor-carrier the court stated:

> "When a railroad company accepts a charter, it assumes the performance of all the duties to the public which are imposed upon it by the charter or the general laws of the state, and it cannot be permitted to escape from the obligations thus imposed upon it by transferring its chartered rights and privileges either to an individual or to another corporation. A corporation must of necessity always act through individuals, and whether such individuals are called its officers, or agents, or its lessee,

cannot affect the question of its liability to perform the obligations which it has incurred, in consideration of its chartered rights and privileges. It cannot be permitted to enjoy the benefits conferred by its charter, without incurring the responsibilities incident thereto." 55 S.E., *supra*, at 221.

Upon consideration of Proctor's motion for a new trial the district judge concluded that the *Reed* decision was inapplicable to the present case since it was based to some degree upon the provisions of a legislative act as well as a section of the Constitution of the State of South Carolina. The legislation, which was designed to permit the consolidation of railroad companies and authorized leases of railroad lines within the state, provided that the lessor railroad should be and remain subject to suit for all causes of action arising out of the operation of the lines notwithstanding any lease thereof. The constitutional section extended to every employee of a railroad company the same rights and remedies for any injury sustained by him as were allowed by law to other persons who were not employees of the railroad. While we agree with the district court that the advertence to the legislative and constitutional provisions in *Reed* dilute its authority somewhat, nevertheless, we are of the opinion that the plaintiff's contention is supported by the underlying rationale of the case which was stated by the court as follows:

"A railroad company has the power to enter into a great many special agreements, but it cannot make a valid contract whereby it will be exempt from liability for negligence. * * * This principle is applied, even when the action is by an employe based on negligence. * * * The reason for the rule is that such contracts are against public policy." (citations omitted)

55 S.E. *supra* at 221.

However, aside from Reed, we think there is a more compelling reason which supports Proctor's position. As a certified interstate carrier Colonial was subject to the supervision and control of the Interstate Commerce Commission, and in augmenting its equipment through the lease agreement with Bales it was required to be in compliance with the Commission's Regulations, 49 C.F.R. §§ 1057.1-1057.6. These regulations and the statute under which they were promulgated require and provide that under such lease arrangements the lessee-carriers "will have full direction and control of such [leased] vehicles and will be fully responsible for the operation thereof * * * as if they were the owners of such vehicles * * *."[2] These regulations were promulgated by the Commission to correct widespread abuses incident to the use of leased equipment by the carriers, *see* American Trucking Assns. v. United States, 344 U.S. 298, 303, 73 S.Ct. 307, 97 L.Ed. 337 (1953), and "the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.", Alford v. Major, 470 F.2d 132, 135 (7 Cir. 1972).[3] The statute and regulatory pattern clearly eliminates the independent contractor concept from such lease arrangements and casts upon Colonial full responsibility for the negligence of Bales as driver of the leased equipment. Any language to the contrary in the lease agreement would be violative of the spirit and letter of the federal regulations and therefore unenforceable.

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[2] 49 U.S.C. § 304(e)(2); 49 C.F.R. § 1057.4(a)(4).

[3] The agreement between Colonial and Bales recognized Colonial's responsibilities under the regulations:

"3. The CARRIER shall have such exclusive possession, control and use of the CONTRACTORS equipment and shall assume responsibility in respect thereto to the extent required by the rules and regulations of the Interstate Commerce Commission."

In its brief Colonial concedes its responsibility to the shipping or traveling public, but contends that this responsibility does not extend to Proctor in his posture as an employee of the lessor Bales. In support of this contention Colonial relies upon our decision in War Emergency Co-op Association v. Widenhouse, 169 F.2d 403 (4 Cir. 1948). In that case Widenhouse, owner-lessor of the truck, sustained damages as a result of the negligent conduct of the driver who was his employee. In declining to countenance a claim by Widenhouse against the lessee-carrier, this court found that the regulations of the Commission furnished no basis "for allowing Widenhouse to recover from defendant for damages caused by the negligence of his [Widenhouse's] own employee.", P. 407. However, the anomaly of Widenhouse is not present in the case before us. The equipment, of course, was not owned by Proctor, and in his position as an employee of Bales there was no contractual relationship between Proctor and Colonial.[4] In the context of Colonial's responsibility under the Commission's Regulations, Proctor was as much a stranger to Colonial as a shipper or a member of the traveling public, and to deny him recovery upon the independent contractor theory would undercut the primary purpose of the regulatory design. The submission of the case to the jury upon this theory was error and requires that the judgment of the district court be set aside and a new trial awarded to the plaintiff. Upon the retrial the district court should direct the jury that under the regulations Colonial was responsible for Bales' conduct in operating the equipment, and negli-

[4] Colonial argues that since Proctor had a contract with it identical to that of Bales, Proctor was aware of the relationship between the parties and such knowledge on his part precludes him from asserting liability against Colonial. We find this contention of no merit since Proctor's contract was operative only when he was furnishing and/or driving his own equipment for Colonial pursuant to his lease agreement.

gence on his part would require a finding of liability with respect to Colonial.

Two other issues raised on this appeal require our attention. Paul Chesley Proctor, a brother of the plaintiff, was tendered as an expert upon the issue of the alleged defective coupler assembly. To demonstrate his qualifications as an expert this witness testified that he had been the owner and operator of a truck stop for a number of years and in such capacity serviced tractors and trailers, greasing and gassing them and doing minor repair work, and that thereafter he had served as a licensed inspector in the State of Kentucky for a period of four years. However, the nature of such inspections was not entirely clear. The record indicates that the district court had serious reservations with respect to the expertise of Proctor, but nevertheless permitted his testimony to be presented to the jury. Proctor theorized that the coupler assembly was not properly secured to the trailer and it was this defect which permitted the trailer to crush the cab in the collision. Upon this issue the defendant called as witnesses its maintenance director and a former mechanic as well as two representatives of Fruehauf, the manufacturer of the trailer. The testimony of these witnesses contradicted Proctor's testimony relative to the construction of the trailer and the coupler assembly, and tended to show that even if the coupler assembly had been defective in the manner detailed by Proctor, such a condition would not have been apparent to Colonial through an inspection of the trailer. In addition to these witnesses, J. A. Johnson, a research engineer in the area of transportation, testified as an expert on behalf of the defendant. Basing his opinion upon the evidence relative to the collision and the assumption that the trailer coupling was not defective, Johnson stated that the minimum load forces created by the impact could only have been dissipated by crushing the cab back into the trailer.

At the close of all of the evidence the district court directed a verdict in favor of Colonial upon this issue. The ruling was based upon the latent nature of any defect in the coupler assembly as well as the lack of its causative role in regard to Proctor's injuries. We find ample support in the record for the court's action. First of all, we share the district court's reservations about Proctor's experience and the area of his expertise, and in the exercise of his discretion the district judge might well have declined to recognize the witness as qualified to state an opinion upon the issue. Bryant v. Sears, Roebuck & Company, 435 F.2d 953 (4 Cir. 1970), Krizak v. W. C. Brooks & Sons, Incorporated, 320 F.2d 37 (4 Cir. 1963). In any event, the clear and convincing evidence presented by Colonial and the tenuous nature of Proctor's testimony warranted a directed verdict in favor of the defendant upon this issue. "The test on directing a verdict * * * is not whether there is any evidence, but whether 'there are no controverted issues of fact upon which reasonable men could differ.'" Pogue v. Retail Credit Company, 453 F.2d 336, 338 (4 Cir. 1972), cert. denied 409 U.S. 1109, 93 S.Ct. 910, 34 L.Ed.2d 689 (1973). In ruling upon the motion, the district judge observed that he did not consider the plaintiff's testimony creditable enough "for me to let a verdict stand on it." Under this well recognized criterion his action was appropriate. Wachovia Bank and Trust Company v. United States, 288 F.2d 750, 757 (4 Cir. 1961).

Finally, Proctor challenges the action of the district court in permitting Colonial's counsel to question him upon cross-examination in regard to a statement signed by him. Proctor identified his signature but testified that he could not remember giving the statement and denied certain portions of it. Proctor contends that under these circumstances Colonial's use of the statement was improper unless the party taking the statement was first called as a witness in regard thereto. The statement

was not introduced as a substantive admission by Proctor but was merely used a prior inconsistent statement for purposes of impeachment. With the authenticity of the signature admitted, the statement was proper impeachment material. *See* Squires v. Henderson, 208 S.C. 58, 36 S.E.2d 738 (1946). The question is of little moment, however, since substantially the same statements were made by Proctor in his pretrial deposition which was also used during the course of his cross-examination. Proctor was a party-litigant and his deposition was, of course, admissible either as substantive evidence or for impeachment purposes. *See* Community Counseling Service, Inc. v. Reilly, 317 F.2d 239, 243 (4 Cir. 1963).

The judgment of the district court is reversed and the case remanded for a new trial consistent herewith.

Reversed and remanded.

Supreme Court, U. S.
FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-483

MRS. DOREEN M. WHITE,
Petitioner,

v.

EXCALIBUR INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF MRS. DOREEN M. WHITE

Of Counsel:

E. CLAYTON SCOFIELD, III
HURT, RICHARDSON, GARNER, TODD & CADENHEAD
1100 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303

T. CULLEN GILLILAND
Attorney for Respondent

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF MRS. DOREEN M. WHITE

Comes now respondent, Excalibur Insurance Company, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed in the above-captioned matter, and respectfully urges the Court to deny the petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported. *See White v. Excalibur Insurance Company*, 599 F.2d 50 (5th Cir. 1979).

STATUTES INVOLVED

In addition to the statutes listed by petitioner, the court of appeals decision involved a construction of Ga. Code Ann. §§ 68-612 and 114-103. The text of these additional statutes is included as an appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

Respondent does not agree with the presentation of the questions presented for review by the petitioner. The issue, respondent submits, is whether this case presents any consideration which would favor review by this Court on certiorari. Respondent submits that it does not. There are no conflicting decisions among the circuit courts of appeals regarding the issues determined below. Furthermore, contrary to petitioner's assertion, no issue of preemption was raised or argued below and preemption is not an issue in this case.

Insofar as the merits are concerned, respondent submits that the issues below were whether plaintiff's decedent was a statutory employee under 49 U.S.C. § 304(e) and whether, further, plaintiff's decedent was a member of the public who had suffered actionable injury under Ga. Code Ann. § 68-612 permitting suit directly against a motor carrier's liability insurer.

STATEMENT OF THE CASE

Respondent has no serious disagreement with petitioner's statement of the case, although respondent shows that the case was succinctly stated by the court of appeals in the opinion below, 599 F.2d 50 at 51-52. Respondent does not agree, however, with the statement of the case to the extent that it attempts to paraphrase the decision of the district court. Respondent further states as an additional fact that there existed in force at the time of this accident a policy of worker's compensation insurance issued by Excalibur Insurance Company, insuring Superior Trucking, Inc., and obligating Excalibur to pay, when due, all compensation and other benefits required of the insured by the worker's compensation law of Georgia.

In that regard, plaintiff's decedent was covered, as a statutory employee, of Superior Trucking Company.

SUMMARY OF ARGUMENT

To summarize respondent's argument, respondent contends that there is no proper basis upon which this Court should review the decision of the Fifth Circuit Court of Appeals as prayed for in the petition for writ of certiorari. The special and important reasons justifying such review are not present. Contrary to petitioner's assertion, there is not a conflict of decision between the courts of appeals on this matter, as the brief will illustrate. Furthermore, there is no conflict arising from this decision with any applicable decisions of this Court.

In addition, the question involved below was not a question of such importance that it should be settled by this Court. The question decided below involved construction of the state law of Georgia and the interaction of state law with the federal law regulating common carriers. The question below, while complex, presented essentially a straightforward application of the principles embodied in 49 U.S.C. § 304(e) in conjunction with the law of Georgia under the Georgia Public Service Commission statutes and the Georgia law of worker's compensation. In short and in sum, the instant case is not a case presenting a question of such importance as would justify review by this Court and is certainly not a case for the exercise by this Court of its power of supervision over the lower courts.

ARGUMENT

The court of appeals found that plaintiff's decedent, a passenger and co-worker with Mr. Lindsey, the driver of

the leased vehicle, was a statutory employee of Superior Trucking Company, a certificated common carrier insured by Excalibur Insurance Company. Reading 49 U.S.C. § 304(e) as requiring motor carriers to assume full direction and control of leased vehicles and full responsibility for the operation thereof as if they were the owners of such vehicles, the circuit court found that plaintiff's deceased, as a statutory employee, was barred by Georgia law from seeking a remedy against Superior Trucking Company apart from worker's compensation.

As a result, because of the worker's compensation bar, plaintiff's deceased was held to have suffered no "actionable injury" which would permit him to recover directly against the insurance carrier under Ga. Code Ann. § 68-612 permitting direct action against insurers of motor carriers. The court found such a suit under 68-612 barred upon the dual ground that plaintiff's deceased had suffered no "actionable injury" and, in addition, was not a member of the "public" for whom the statute was enacted.

Turning then to liability under the federal law, the court found that recovery was barred under 49 U.S.C. § 315 because of the failure of plaintiff to secure a judgment against Superior Trucking Company as required under that statute. Accordingly, the circuit court of appeals affirmed the trial court's dismissal of the plaintiff's action.

Contrary to petitioner's assertion in her brief, the decision of the Fifth Circuit Court of Appeals is not in conflict with decisions of other courts of appeals. Although the Fifth Circuit noted its difference with the Fourth Circuit in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974), a review of that decision shows that it is not in conflict with the result reached in

the instant case. In that case, the Fourth Circuit held improper a jury instruction that the existence of an independent contractor relationship between the lessor-direct employer and the lessee-common carrier would insulate the common carrier from liability and responsibility for the conduct of the leased driver, the court holding that the driver was the statutory employee of the carrier under 49 U.S.C. § 304(e). With this proposition respondent does not disagree. However, the court in *Proctor, supra,* was not presented with the further step of determining whether the applicable state workmen's compensation law or any other state law governing the employer-employee relationship might have applied to prohibit recovery. The *Proctor* decision turned upon the clearly erroneous instruction of the trial court that the independent contractor relationship would insulate the lessee-carrier from liability. That decision was thus not in conflict with the issue reached in this case.

Similarly, the case of *Cape Air Freight, Inc. v. United States,* 586 F.2d 170 (10th Cir. 1978), is certainly not in conflict with the court of appeals decision in this case. *Cape Air Freight, Inc., supra,* held only that a cease and desist order from the Interstate Commerce Commission directed at the use of agents by a carrier was error. The court held that the use of leased equipment by carriers was permitted under federal law, subject, of course, to the control and responsibility requirements provided under the Interstate Commerce Act. Contrary to petitioner's assertion, the Fifth Circuit in the decision below did not prohibit the use of leased equipment, but only reaffirmed the intendment of 49 U.S.C. § 304(e) that the carrier be held responsible as if it were the owner, regardless of the relationship between the lessor and lessee.

The above decisions constitute the sole authority relied upon by the petitioner for a purported conflict between the courts of appeals. Respondent submits that there is no conflict.

Furthermore, the decision of the court of appeals is not in conflict with any applicable decisions of this Court. The authorities cited by petitioner in this regard are inapposite. *American Trucking Association v. United States*, 344 U.S. 298 (1953), involved an attack on the rules of the Interstate Commerce Commission governing leased vehicles. Those rules provided, *inter alia*, that any such contracts must be in writing; that control must be vested in the carrier; and that the carrier must undertake certain duties of inspection. The court's decision in that case simply upheld the rule-making power by the Interstate Commerce Commission over the use of such non-owned equipment. That issue is clearly not involved in this case.

Similarly, the case of *Transamerican Freight Lines v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975), does not constitute applicable authority in conflict with the Fifth Circuit decision. That case held simply that an indemnification provision entered into between a lessee-carrier and lessor providing for indemnification by the lessor to the lessee in the event of the lessor's negligence was valid and did not conflict with the statutory requirement that the carrier undertake operational control and responsibility for the vehicles regardless of the contractual relation between the parties. It is clearly not applicable to the instant case.

The present case is not one presenting an important question which should be settled by this court. The authority under the federal statute for the imposition of responsibility on motor carriers who lease equipment is

undisputed and is not called into question by these proceedings. The statute provides that the carrier will be responsible regardless of its contractual relations with the lessor, as if it were the owner of the vehicle. *See* 49 U.S.C. § 304(e). Implementation of this statutory dictate has given rise to the status of statutory employee. Thus, employees of an independent contractor will be deemed to be employees of the carrier to the extent necessary to effectuate the mandate of § 304(e). In short, employees of the lessor will be treated as employees of the lessee-carrier to the extent necessary to make the carrier responsible as if it had been the owner and operator of the vehicle. *See, e.g., Simmons v. King*, 478 F.2d 857 (5th Cir. 1973).

It is clear that under § 304(e) plaintiff's decedent was a statutory employee of the carrier. As such, the carrier was permitted to avail itself of the legal rights which would be applicable had the carrier in fact been the owner, operator and employer. Clearly, under this situation, plaintiff's right of action was barred under the Georgia worker's compensation law. *See* Ga. Code Ann. § 114-103.

It follows from the worker's compensation bar that a direct action against respondent could not be maintained under either state or federal law. The action was not maintainable under state law under familiar and well settled decisions of the Georgia courts. And a direct action was barred under 49 U.S.C. § 315 because no judgment was first rendered against the carrier as required under that statute. Indeed, petitioner does not proceed under § 315. *See* Petition at 16.

As the above outline of the holding of the court of appeals shows, this action presented a relatively straightforward application of settled legal principles to a some-

what novel factual situation. The result does not present an issue calling for a pronouncement from this Court.

CONCLUSION

In conclusion, respondent urges that the petition for writ of certiorari be denied. As outlined above, there are no special or important reasons for the grant of the court's discretion to review this matter on writ of certiorari. There is no conflict within the circuits; there is no conflict with applicable decisions of this Court; furthermore, the question presented is not an important question of federal law which should be confronted by this court. Rule 19, Rules of the Supreme Court.

Respectfully submitted,

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD

/s/
T. CULLEN GILLILAND
Attorney for Respondent

1100 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 525-1100

CERTIFICATE OF SERVICE

I, T. CULLEN GILLILAND, Attorney for Excalibur Insurance Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16 day of October, 1979, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari of Mrs. Doreen M. White on Petitioner, Mrs. Doreen M. White, by mailing a copy, in a duly addressed envelope, with sufficient postage prepaid, to Mr. O. L. Crumbley, 206 American Federal Building, Macon, Georgia 31201, Counsel for Petitioner.

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD

By: /s/
T. CULLEN GILLILAND

1100 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 525-1100

APPENDIX

A-1

ADDENDUM

Section 68-612, *Ga. Code Ann.:*

Bond; indemnity in lieu of bond; self-insurance

No certificate shall be issued or continued in operation unless the holder thereof shall give and maintain bond, with adequate security, for the protection, in case of passenger vehicles, of the passengers and baggage carried, and of the public against injury proximately caused by the negligence of such motor common carrier, its servants or agents; and in the cases of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor common carrier may be legally liable; and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents. The commission shall approve, determine and fix the amount of such bonds, and shall prescribe the provisions and limitations thereof, and such bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The commission may, in its discretion, allow the holder of such certificate to file, in lieu of such bond, a policy of indemnity insurance in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds, and must likewise be approved by the commission. The commission shall have power to permit self-insurance in lieu of a bond or policy of indemnity insurance, whenever, in its opinion, the financial ability of the motor carrier so warrants. It shall be permissible under this Chapter for any person having a cause of action arising hereunder in tort or contract to join in the same suit the motor carrier and its

surety in the event a bond is given. If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract.

(Acts 1931, pp. 199, 203; 1937, pp. 730, 731.)

Section 114-103, *Ga. Code Ann.:*

Other remedies excluded by this law

The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service or death: Provided, however, that no employee shall be deprived of any right to bring an action against any third-party tortfeasor.

(Acts 1920, p. 176; 1972, pp. 929, 930.)